IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOURCEONE GLOBAL PARTNERS, LLC, **Plaintiff,** **v.** **KGK SYNERGIZE, INC.,** **Defendant.**	)	**Magistrate Judge Schenkier** **Case No.: 08 CV 7403**
KGK SYNERGIZE, INC., **Counterclaim-Plaintiff and Third-Party Plaintiff,** **v.** **SOURCE ONE GLOBAL PARTNERS, LLC, d/b/a SOURCEONE GLOBAL PARTNERS, d/b/a SOURCE ONE GLOBAL PARTNERS, LLP, and f/k/a SOURCE ONE GLOBAL, LLC,** **Counterclaim-Defendant** **and** **JESSE LOPEZ,** **Third-Party Defendant.**	)	

JESSE LOPEZ'S REPLY SUPPLEMENTAL MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS KGK'S FIRST AMENDED THIRD PARTY COMPLAINT

KGK's Response (the "Response") to Jesse Lopez's Supplemental Memorandum in Support of his Motion to Dismiss fails to cure the facial implausibility of its claims against Lopez. Neither in its Amended Complaint nor in its Response does KGK provide any grounds that would support the extreme measure of holding Jesse Lopez personally liable for the alleged acts of SourceOne. Instead, KGK's Response treats the entire concept of limited liability with disdain, and to be readily dispensed with if it serves KGK's objective of seeking to place undue pressure upon SourceOne and its President and CEO. KGK's gambit should be rejected, and its Amended Complaint should be dismissed with prejudice.

I. **The Facts Alleged by KGK Do Not Support Its Claims Against Jesse Lopez For Alter Ego Liability.**

In its Response, KGK seeks to bolster the insufficient allegations of its Amended Complaint by re-characterizing those allegations in the strongest language possible. However, no amount of sophistry can hide the absence of any factual basis for holding Jesse Lopez in as a Third Party Defendant in this case. KGK's attempts to manufacture such a basis only further illustrate why its Amended Complaint should be dismissed.

KGK first demonstrates its contempt for well-settled principles of limited liability. In KGK's estimation, the fact that Jesse Lopez is the acknowledged decision maker and "prime mover" at SourceOne is ample justification to hold him personally liable for SourceOne's purported acts and omissions. *See* Response at pp. 2-3. Similarly, KGK apparently believes that adding the words "Lopez knowingly caused . . ." to the beginning of several allegations against SourceOne is sufficient to provide "facial plausibility" for its claims that Lopez is personally liable for SourceOne's purported acts and omissions. *See* Response at p. 2.

KGK also seeks to exaggerate the already overblown allegations in its Amended Complaint as a means of preserving its claims against Lopez. In this regard, KGK mistakenly asserts that pledging personal assets as security for a small business loan constitutes "commingling . . . personal assets with those of SourceOne." *See* Response at p. 2. KGK then attempts to parlay the relatively milquetoast -- and, yet, by far the most substantive -- allegations in the Amended Complaint regarding PwC's February 2007 audit[1] into an all-out assault on Jesse

[1] As Lopez pointed out in his Supplemental Memorandum, KGK places an extraordinary amount of reliance on two or three events that occurred during a few days in February 2007 -- at an audit at which no employee of KGK was even present -- despite the several years-long licensing relationship between

Lopez's credibility. In terms much stronger than were alleged in its Amended Complaint, KGK now asserts that "Lopez *hid* information and *prevented* SourceOne's employees from giving complete and accurate information to KGK's auditors," and Lopez "*remove[ed]* a binder that SourceOne's that SourceOne's bookkeeper had prepared, and then *lied* about it." *Compare* Amended Complaint at ¶¶ 22-29 with Response at pp. 2-3. Similarly, KGK adds an entirely new twist to the bland allegation from its Amended Complaint that "PwC discovered that during 2006, Lopez caused Source One to switch from a four-digit invoice number to a five-digit number," *see* Amended Complaint at ¶ 29, now arguing that this "would allow unrecorded sales to occur." *See* Response at p. 3. In light of the poetic license taken by KGK with respect to its very own allegations in the Amended Complaint, it is highly ironic that KGK's Response accuses Lopez of "unsupported hyperbole." Id. Finally, KGK again asserts that "Lopez would be unjustly enriched if not enjoined from future infringement of KGK's patents and trademarks and if not held personally liable for the damages caused by his misconduct as the 'prime mover behind SourceOne.'" Id. While KGK contends in its Response that "[t]he Court need not be concerned about every unidentified owner of an undefined small business," Response at p. 4, the fact remains that, if KGK's "unjust enrichment" theory is accepted as a ground for holding small business owners or officers personally liable for the acts of their companies, then well established principles of alter ego liability would be turned on their head.

Notably, Jesse Lopez has not engaged in a "piecemeal analysis of the facts" as KGK claims. The facts, as alleged by KGK simply indicate that Jesse Lopez is the founder, President and CEO of SourceOne and, as such, the primary decision maker at SourceOne; that, in this role,

SourceOne and KGK. Moreover, in the Amended Complaint and its briefing, KGK has tellingly sought to stretch these two or three events into essentially the entire factual basis for its claims against Lopez. *Compare* ¶¶ 22-29 of the Amended Complaint with ¶¶ 17-20, 30-34; *see also* KGK's Memorandum in Opposition to Motion to Dismiss, filed April 23, 2009 (Doc. #49), at p. 10.

he "caused" SourceOne to switched from a five-digit invoice number to a four-digit number; that, during PwC's February 2007 audit, there were some instances where "sales orders and shipping documents purportedly were very difficult to locate and in some cases purportedly could not be found" and where a document binder "vanished;" that Lopez's wife "handled" payments by SourceOne to KGK; and that the Lopez family residence was pledged as security for a SourceOne business line of credit.[2] *See* Amended Complaint at ¶¶ 17-34. KGK seeks to rely upon McCracken v. Olson Companies, Inc., 149 Ill. App. 3d 104, 109-110, 500 N.E.2d 487, 49 (Ill. App. 1986), but the facts of that case are far afield from what KGK has pled here. As the McCracken court held:

> In determining whether to disregard a corporate entity, the court will not rest its decision on a single factor but will rather look to a number of variables such as inadequate capitalization, failure to observe corporate formalities, the commingling of funds, and the absence of corporate records. . . . Where such variables are coupled with some element of injustice or fundamental unfairness, the corporation will be considered as an aggregate of persons both in equity and at law and its officers, directors and shareholders will be held individually liable for the corporation's debts and obligations.

Id. at 109-110 (internal citations omitted). Merely because KGK conclusorily contends that the "totality of the facts in this case . . . give rise to a reasonable inference that Lopez should be held liable for SourceOne's misconduct" does not make it so. *See* Response at p. 4. KGK has alleged no evidence of inadequate capitalization, no failure to observe corporate formalities, no commingling of funds (again, pledging personal assets as collateral for a small business loan does not count -- as a matter of law or common sense), and no absence of corporate records (but merely that "sales orders and shipping documents purportedly were very difficult to locate and in some cases purportedly could not be found"). *See* id. at 109-110. Nor has KGK pled a facially

[2] *See* Bankers Trust Co. v. Chicago Title & Trust Company, 412 N.E.2d 660, 664 (Ill. App. 1980) (holding that a personal guarantee by a business owner and his wife, who was not part of the company, is not an unusual situation for a small business and does not demonstrate the unity of interest required to pierce the corporate veil).

plausible “element of injustice or fundamental unfairness.” Id. Indeed, viewing the entirety of KGK’s flimsy “alter ego” allegations in context -- and with a sense of reason and perspective -- is precisely what demonstrates their utter lack of merit.

II. **There is No Basis for KGK’s “Direct” Claims Against Jesse Lopez for Breach of Contract and Patent Infringement.**

Little more needs to be said about KGK’s meritless attempts to assert a direct claim against Jesse Lopez, whether for breach of contract or for patent infringement. Counts V and VI of KGK’s Amended Complaint are identical to the ineffectual Counts V and VI of its original Complaint, alleging that Lopez personally breached the License Agreement and the Settlement Agreement. Accordingly, SourceOne relies on its prior briefing regarding the need to dismiss Counts V and VI for failure to state a claim upon which relief can be granted. Furthermore, KGK’s new claim for infringement of the ‘125 Patent (Count VIII) should be dismissed for the same reasons as Counts I and II of the Third Party Complaint (also unchanged in the First Amended Complaint) should be dismissed -- namely, KGK has not pled any facts showing that Jesse Lopez acted outside his capacity as CEO and President of SourceOne such that he should be held personally liable for the allegedly infringing acts of SourceOne. *See* The Drink Group, Inc. v. Gulfstream Communications, Inc., 7 F. Supp.2d 1009 (N.D. Ill. 1998). Accordingly, the entirety of the First Amended Complaint against Jesse Lopez should be dismissed.

II. CONCLUSION

WHEREFORE, for all the foregoing reasons, Jesse Lopez respectfully requests that this Court dismiss KGK’s First Amended Third Party Complaint with prejudice.

Respectfully submitted,

POLSINELLI SHUGHART PC

By: s/Carina M.C. Segalini ___
KEITH J. GRADY (N.D. IL #90785673)
(314) 552-6883 (Direct)
GRAHAM L.W. DAY (N.D. IL #107919)
(314) 622-6609 (Direct)
100 South Fourth Street, Suite 1100
St. Louis, MO 63102
Tel. No. (314) 552-6800 (Main)
Fax No. (314) 231-1776
kgrady@polsinelli.com
gday@polsinelli.com

JOHN J. CURRY (IL #3121647)
CARINA M.C. SEGALINI (IL # 6287348)
Two Prudential Plaza
180 N. Stetson Avenue, Suite 4525
Chicago, IL 60601
Tel. No. (312) 819-1900
Fax No. (312) 819-1910
jcurry@polsinelli.com
csegalini@polsinelli.com

ATTORNEYS FOR THIRD PARTY DEFENDANT JESSE LOPEZ and PLAINTIFF/COUNTERCLAIM DEFENDANT SOURCEONE GLOBAL PARTNERS, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served via filing with the Court's electronic filing system on all counsel of record this 30th day of June, 2009:

Annette M. McGarry, Esq.
Marianne C. Holzhall, Esq.
McGarry & McGarry, LLC
120 North LaSalle, #1100
Chicago, IL 60602
Tel.: (312) 345-4600
Fax: (312) 345-4601

Marvin S. Gittes, Esq. (*pro hac vice*)
Kevin N. Ainsworth, Esq. (*pro hac vice*)
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
Chrysler Center
666 Third Avenue
New York, NY 10017
Tel.: (212) 935-3000

ATTORNEYS FOR DEFENDANT/COUNTERCLAIM PLAINTIFF and THIRD-PARTY PLAINTIFF KGK SYNERGIZE, INC.

s/Carina M.C. Segalini

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